

ORIGINAL FILED

NOV 04 2003

BANKRUPTCY COURT
OAKLAND, CALIFORNIA

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re No. 00-46985 J
LARRY GREENWOOD and
PAGE GREENWOOD,
Debtor. /

DECISION RE U.S. TRUSTEE'S: (A) MOTION TO RECONSIDER
CHAPTER 7 TRUSTEE'S FEES AND (B) REQUEST FOR COURT TO
MODIFY TERMS OF CHAPTER 7 TRUSTEE'S COUNSEL'S
VOLUNTARY SUBORDINATION

William T. Neary, United States trustee ("Neary"), has filed a motion for reconsideration of the court's allowance of compensation herein to Tevis T. Thompson, Jr., trustee in bankruptcy ("Thompson"). Neary concedes that he did not file a timely objection to Thompson's fees, and that no special circumstances existed that would justify his failure in this regard.¹ Indeed, the U.S. trustee's office reviewed Thompson's Final Report containing Thompson's fee request before Thompson filed it.

¹Neary's motion for reconsideration, however, is timely because Neary filed it before the court's order allowing Thompson's compensation became final.

Decision: Reconsideration of Fees

1 Neary also requests the court to unilaterally modify a court-
2 approved agreement by Thompson's counsel, Wendel, Rosen, Black and
3 Dean LLP ("Wendel"), by which Wendel agreed that Thompson and his
4 accountants and real estate brokers could be paid their court
5 allowed fees in full, and that Wendel would receive payment of its
6 allowed fees and costs to the extent funds remained in the estate.²
7 Wendel so agreed knowing that the estate was administratively
8 insolvent. Under its agreement, Wendel will be paid approximately
9 \$34,000 less than the amount of its allowed fees and costs, and less
10 than the amount that it would have received had the estate been
11 prorated among the professionals, based on the allowed amounts of
12 their fees and costs.³

13 Specifically, Neary asks the court to reduce Thompson's fees by
14 \$28,377, and order Thompson to pay that amount not to Wendel, whose
15 allowed but unpaid fees exceed that sum, but to the unsecured
16 claimants.

17 The court will deny Neary's motion.

18 A. Reconsideration

19 Neary relies on Pioneer Inv. Serv. Co. v. Brunswick Associates

20 ²The arrangement is reflected in the attachment to the
21 Trustee's Final Report filed August 29, 2003, and was mentioned
22 on the record at the court hearing thereon held September 18,
23 2003. Tape of hearing held September 18, 2003.

24 ³Thompson's report shows that his accountants, Bachecki,
25 Crom & Co., are scheduled to receive fees and costs totaling
26 \$6,612.53, and that Thompson paid administrative claims to real
estate brokers totaling \$52,500. Thompson's allowed fees total
\$49,037.

1 Ltd. Partnership, 507 U.S. 380, 113 S.Ct. 1489 (1993) to justify its
2 failure to file a written objection to either Thompson's fees or
3 Wendel's voluntary subordination. In Pioneer, the Supreme Court
4 held that an attorney's inadvertent failure to file a timely proof
5 of claim in a chapter 11 case could constitute "excuseable neglect"
6 under Fed. R. Bankr. P. 9006(b)(1).

7 In its opinion, the Supreme Court set forth a non-exclusive
8 list of factors the court should consider when determining the
9 applicability of the Rule 9006(b) "excusable neglect" standard. The
10 factors to be considered include: (1) the danger or prejudice to the
11 debtor, (2) the length of delay and its potential impact on judicial
12 proceedings, (3) the reason for the delay, including whether it was
13 within the reasonable control of the movant, and (4) whether the
14 movant acted in good faith. Id. at 395.

15 The Supreme Court also emphasized that determination whether a
16 claimant's neglect is "excusable" is primarily an "equitable one,"
17 in which courts must take into account all relevant circumstances
18 surrounding the claimant's failure to file. Id. at 394-95.

19 Here, Thompson did substantial paperwork to get this case ready
20 for closing. Granting of Neary's motion will cause Thompson and his
21 attorneys even more work for which they may not be compensated in
22 full because the estate is already insolvent.

23 Moreover, the end result if Neary were to prevail in all
24 respects would be a dividend to unsecured claimants that Wendel
25 calculates to be \$.0036 on the dollar. In addition, Neary offers no
26 valid reason for the delay in objecting to Thompson's fees on the

1 grounds now asserted.

2 Finally, it is clear that the object of Neary's present efforts
3 is to create a dividend for unsecured claimants at the expense of
4 Wendel and Thompson, when neither of them has done anything wrong,
5 when Wendel cannot be paid the full amount of its allowed fees
6 because the estate lacks the funds, and when Neary has raised no
7 objection to Wendel's fees. There is nothing equitable about such a
8 result, and equity thus demands that Neary be denied relief.

9 Pioneer, 507 U.S. at 394-95. (See next section.)

10 B. Wendel Did Not Violate the Bankruptcy Code By Voluntarily
11 Subordinating its Fees

12 Neary's request that the court modify Wendel's voluntary
13 subordination agreement is unprecedented.

14 Neary concedes that Wendel agreed to subordinate its fees to
15 the other professionals, not the general unsecured claimants. Neary
16 also concedes that unless the court modifies Wendel's voluntary
17 subordination agreement, any reduction in the amount of Thompson's
18 allowed fees would result in an increase in the amount that must be
19 paid to Wendel, dollar for dollar.

20 Nor does Neary argue that Wendel agreed to stand behind the
21 other professionals in exchange for some undisclosed quid pro quo,
22 or that Wendel, Thompson, or anyone else concealed any information
23 from the court in connection with the subordination arrangement.
24 Nor does Neary cite any legal authority for the proposition that the
25 court has the authority, by fiat over the opposition of the
26 professionals, to change the terms of Wendel's voluntary

1 subordination.

2 Neary's sole argument is that Wendel violated the Bankruptcy
3 Code's proscription against "fee sharing" when it agreed to stand
4 behind the other professionals.

5 Bankruptcy Code § 504(a) provides

6 Except as provided in subsection (b) of this section, a
7 person receiving compensation or reimbursement under
8 section 503(b)(2) or 503(b)(4) of this title may not share
9 or agree to share—

10 (1) any such compensation or reimbursement with
11 another person; or

12 (2) any compensation or reimbursement received by
13 another person under such sections.

14 Thus, fee sharing in bankruptcy cases is prohibited. Id.

15 Here, it is unclear what funds Neary accuses Wendel of sharing,
16 especially given the fact that Neary makes no allegation that Wendel
17 actually paid any proceeds of allowed compensation in this case to
18 Thompson or anyone else, or that Wendel agreed to do so.

19 Presumably Neary contends that Wendel "constructively shared"
20 fees by subordinating fees. If so, again, it is unclear which fees
21 Neary accuses Wendel of constructively sharing.⁴

22 What is clear is that Neary's fee sharing argument completely

23 ⁴Presumably the "shared" fees could be the amount Neary
24 wishes paid to the unsecured claimants, which is the amount Neary
25 requests the court to deduct from Thompson's compensation. Or
26 perhaps Neary is referring to the excess of the amount Wendel
would have received, had the funds payable to all the
professionals been prorated, over the amount Wendel is scheduled
to receive based on its subordination.

1 misapprehends Bankruptcy Code § 504(a).⁵ Fee sharing is prohibited
2 for two basic reasons. First, "[w]henver fees are shared among two
3 or more professionals, there is incentive to adjust upward the
4 compensation sought in order to offset any diminution to one's own
5 share." 4 Collier on Bankruptcy § 504.01 (15th Ed. Rev.) (Matthew
6 Bender 2003). Second, fee sharing "also subjects the professional
7 to outside influences over which the court has no control, which
8 tends to transfer from the court some degree of power over
9 expenditure and allowances." Id. See also Well v. Neary, 278 U.S.
10 160 (1929) (C.J. Taft).

11 Here, apart from the evident and paramount facts that Wendel
12 shared no fees, and did not agree to do so, Wendel's subordination
13 carried none of the risks engendered by fee sharing arrangements.
14 Rather than increasing its fees to help fund a sharing arrangement,
15 Wendel's agreement resulted, by design, in a reduction of the amount
16 Wendel can receive. And here, there were no claimants involved who
17 were not before the court and whose participation in any allowances
18 were not subject to court scrutiny and approval. Thus, no risk was
19 posed by "outside influences" beyond the court's control.

20 C. Conclusion

21 The court will issue its order denying Neary's motion for
22 reconsideration and Neary's request that the court modify the terms
23 of Wendel's subordination.

24
25 ⁵At oral argument, the Asst. U.S. trustee representing Neary
26 went so far as to argue that a waiver of fees by a professional,
without more, might constitute unlawful fee sharing.

Dated: November 4, 2003

Edward D. Jellen
United States Bankruptcy Judge

